2021 Division Seminar Presentation:
Work Risks, Personal Risks, Neutral Risks and Idiopathic Causes

K.S.A. 44-508(f)(3)(A) states:

> "The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include:
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
> (ii) accident of injury which arose out of a neutral risk with no particular employment of personal character;
> (iii) accident of injury which arose out of a risk personal to the worker; or
> (iv) accident of injury which arose directly or indirectly from idiopathic causes."

In Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979), the Kansas Supreme Court explained that there are three (3) general categories of risks in workers compensation cases.

> "(1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) the so-called neutral risks which have no particular employment or personal character."

597 P.2d at 644.

Work-related risks are universally compensable. Personal risks have never been compensable.

NEUTRAL RISKS

Neutral risks create a unique challenge. Neutral risks include being hit by a stray bullet while in the middle of a factory floor, bitten by a mad dog, stabbed by a lunatic, struck by lightning, thrown down by a hurricane, and any variety of other unusual circumstances which are neither personal nor employment-related. Larson, "The

Positional Risk Doctrine in Workers Compensation", Duke Law Journal, Vol. 1973, September, Number 4.

Another kind of neutral risk is that in which the cause itself is simply unknown. For example: an employee may be found to have died on the job from unexplained causes, is attacked by a person whose motives are unknown, or the worker may suffer an unexplained slip and fall.

Courts deal with neutral risk situations in three (3) different ways. Some Courts apply an "increased risk" analysis. Under this doctrine, the employment must have increased the quantity of risk to the claimant as compared to the risk of the general public. For example: in a lightning-strike case, the claimant must prove that the employment increased the risk of exposure to lightning by placing the claimant on a height, near metal, or in contact with an element that conducts electricity. Larson, supra, p. 763.

Courts may also apply an "actual risk" doctrine for neutral risk claims. Under this doctrine, the Courts do not care whether the risk was common to the public if it is also a risk of this employment. In Hughes v. Trustees of St. Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665 (1927), a section boss suffered heat exhaustion while working in a cemetery. The Court stated:

> "Although the risk be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk."

The most liberal view of neutral risk cases involves the "positional risk" doctrine. Under this doctrine,

> "An injury 'arises out of' employment if it would not have occurred *but for* the fact that the conditions or obligations of employment placed claimant in the position where he was injured by a neutral force…"

Larson, supra at 761.

Under this approach, the claim is compensable if the "in the course of" requirement is met.

In Hensley, the Kansas Supreme Court found that neutral risks were compensable under the Kansas Workers Compensation Act. The Supreme Court did not delineate one (1) doctrine (increased risk, actual risk, or positional risk) but simply found that claim compensable. The facts of the case imply that the Court was adopting an "increased risk" analysis.

Mr. Hensley - while working on the roof of a parking garage in downtown Wichita - was shot by a sniper. There was no connection between the sniper and any of his victims. The Director reviewed prior assault cases and stated:

> "The pivotal question to be answered is whether the employment caused the employee to be exposed to an added risk or hazard to some degree greater than if not in his employment."

Hensley, supra at 261.

The Supreme Court agreed with this analysis.

> "The fact that at least three of the first six shots were fired at decedent and his co-worker clearly shows that they were prime targets, because of their physical location. Had they been on the street level, walking or driving, as was the general public they might not have been targets. In that situation they might have been on equal footing with the general public, however, since they were in an elevated position making them closer to the sniper, their risk of being shot was substantially increased."

Hensley at 262, see also Orr v. Holiday Inns, Inc., 6 Kan. App.2d 335, 627 P.2d, 1193 (1981).

This is similar to the way the Kansas Supreme Court ruled in a claim where the employee was killed during a tornado - another type of neutral risk situation. The Court also adopted an increased risk analysis.

> "When the injury occurs from the elements, such as a tornado, or the like, the rule is that in order for it to be said the injury arose out of the employment, and thus compensable, it is essential there be a showing that the employment in some specific way can be said to have increased the workman's hazard to the element-that is, there must be a showing of some causal connection between the employment and the injury caused by the element, and that his situation was more hazardous because of his employment than it would have been otherwise."

Faulkner v. Yellow Transit Freight Lines, 187 Kan. 667, Syl. 2 (1961).

Unexplained falls - another type of neutral risk - were also found compensable as neutral risks under the pre-2011 law. However, these neutral risk claims relied on a "positional risk" doctrine.

In McCready v. Payless Shoesource, 41 Kan. App.2d 79, 200 P.3d 479 (2009), Sharon McCready injured herself when she stepped from a car and fell. There was no explanation for the fall. She presented no evidence that the environment around her increased the risk of a fall or increased the dangerous effects of a fall. She simply fell on a flat surface for an unknown reason.

The Kansas Court of Appeals - nevertheless - found the claim as compensable as a neutral risk. Relying on the Hensley case, the Court found that neutral risks were compensable in Kansas. Although the Court noted that Mr. Hensley was at an increased risk for being shot by the sniper, the panel did not find that an increased risk was necessary for an accident from a neutral risk to be compensable. Instead, the Court found

that neutral risks were compensable based on the positional risk doctrine. McCready, supra at 89.

The positional risk doctrine was also utilized by the Court of Appeals in Dawson v. State of Kansas, 262 P.3d 358 (2011). Ms. Dawson had an unexplained fall while going up a set of stairs. The Board found the claim compensable and the State of Kansas appealed - arguing that a neutral risk was compensable only if the job duties created an increased risk of injury. The Court of Appeals disagreed.

> "The State's contention that a compensable injury must always involve an increased risk directly associated with the job or involve situations that differ from the ordinary activities of daily living is without merit."

Dawson at *3.

The 2011 Legislature codified that personal risks are not compensable. K.S.A. 44-508(f)(3)(A) also limited what neutral risks are compensable. A neutral risk is not compensable if it has no "employment character". "Employment character" has been defined in some neutral risk cases - post the 2011 changes - as equating to an increased risk of accident or increased severity of injuries. In other post-2011 accidents, "employment character" only requires that the job duties create an actual risk of injury.

The increased risk requirement continues to be applied to assault cases. In Connolly v. Minsky's City Market, 432 P.3d 107 (unpublished opinion) (Kan. App. 2018), Theodore Connolly was savagely beaten and sustained serious and permanent injuries as he checked the area around the restaurant he managed before heading home for the night. Connolly's memory of the events was sketchy. Three (3) men - who were customers in the restaurant - attacked him on the sidewalk - an area Connolly helped maintain in

good shape for the restaurant. He was carrying a briefcase filled with work materials which was taken by his attackers.

Minsky's denied that the attack arose out of employment in that it was unexplained. Relying on the Hensley case, the Court of Appeals found that the evidence supported the conclusion that Connolly was in a place where he was at greater risk of assault than the general public. This neutral risk was compensable under the increased risk doctrine.

The increased risk analysis has also been applied to some unexplained accident cases. For example: in Smalley v. Skyy Drilling, 353 P.3d 469 (unpublished opinion) (Kan. App. 2015), Nathan Smalley died from severe injuries after the vehicle he was riding in struck a tree. Nathan and his brother - Trevor - were driving to a remote job site for Skyy Drilling. Skyy argued that - since the cause of the accident was never precisely determined - the Board erred in finding that the accident arose out of and in the course of employment.

The Court of Appeals disagreed with Skyy's argument. The precise cause of the accident need not be determined. Citing Bennett v. Wichita Fence Co., 16 Kan. App.2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992), the Court found that driving for work created an increased risk of injury. As such, the claim was compensable. The reference to the Bennett case is confusing since this mixed risk case involves the combination of a "personal risk" and a "work risk" rather than a neutral risk.

Similarly - in Stepter v. LKQ, 404 P.3d 357 (unpublished opinion) (Kan. App. 2017) - the claimant was injured when his truck left the highway and wrecked for an unknown reason.

> "Here it is undisputed the accident occurred while Stepter was at work and in the course of his work delivering car parts to

> various body shops in western Kansas. The only issue is what specifically caused the accident, and that fact is unknown. The record contains speculation he fell asleep, but no one knows for sure what happened. Sometimes accidents happen for unknown reasons and that does not mean the injured worker is not covered by the KWCA."

Stepter at *3.

In the last two (2) years, the Courts have turned to an analysis of the claimant's job duties to determine the compensability of some neutral risk accidents. These cases do not require an increased risk environment. Instead, they appear to apply an actual risk analysis.

THE INTERACTION OF ACTIVITIES OF DAY-TO-DAY LIVING AND NEUTRAL RISKS

Three (3) Court of Appeals panels have looked at the compensability of unexplained falls - which are a type of neutral risk - based on the application of the Kansas Supreme Court decision in Bryant v. Midwest Staff Solutions, 292 Kan. 585, 257 P.3d 255 (2011).

Mr. Bryant suffered a back injury while working on an air conditioner installation. He stooped down or tried to lean over to carry out some welding and felt an explosive increase in low back pain. He eventually underwent a multi-level fusion. A claim for workers compensation benefits was filed.

The employer denied the claim - arguing that the injuries were the result of normal activities of daily living and - therefore – were non-compensable. The Kansas Supreme Court disagreed.

The 1974 version of the statute used the phrase "suffers disability … by the normal activities of day-to-day living". This is susceptible to two (2) different interpretations. In deciding which interpretation was correct, the Kansas Supreme Court reviewed prior

caselaw involving personal risk and neutral risk cases although they were not identified as such. (See Covert v. John Morrell & Co., 138 Kan. 592 (1933) (claimant lost an eye when someone threw a chunk of mud at his windshield for an unknown reason); Taber v. Tole Landscape Co., 181 Kan. 616, 313 P.2d 290 (1957) (heat exhaustion case); & Siebert v. Hoch, 199 Kan. 299, 428 P.2d 825 (1967) (death from an assault for unknown reasons.) The Court could find no consistent bright-line rule emerging from analysis of the cases. The Court concluded as follows:

> "Although no bright-line test for what constitutes a work-injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of the performing one's job. …
>
> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on whether the activity that results in the injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement-bending, twisting, lifting, walking, or other body motions-but looks to the overall context of what the workers was doing-welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities."

Bryant at 596 &597.

Under this test, an activity of day-to-day living is simply a personal risk – i.e. - one with no increased or actual risk from employment. If there is an employment activity involved in the injury, the accident is compensable.

The Supreme Court ruling in Bryant is not affected by the 2011 changes in the KWCA. See Moore v. Venture Corp., 51 Kan. App.2d 132, 343 P.3d 114 (2015).

In Johnson v. Stormont Vail Healthcare, Inc., 57 Kan. App.2d 44 (2019), *rev. denied* 2/25/2020, the claimant - a cleaning lady at the hospital - fell twice at work. She could not explain the reasons for the falls. The claim was denied by the insurance carrier as a non-compensable neutral risk. The Court of Appeals found this exemption statute had qualifying language. The last part of the sentence - "with no particular employment or personal character" - is significant.

Citing the Supreme Court in Bryant, the focus should be on whether the activity that results in injury is connected to – or is in - the performance of the job.

> "The Board properly look at the overall context of Johnson's job duties when it made its ruling. With the guidance of Bryant, and its one simple test, when we ask, 'was there a work-related injury?' we can only say 'Yes'. Although Johnson's injuries arose from unexplained falls, she was entitled to workers compensation benefits because under the circumstances, the neutral risks which had a particular employment character."

Johnson, at *52 & 53. See also Netherland v. Midwest Homestead of Olathe Operations LLC, 448 P.3d 497 (2019) & Munoz v. Southwest Medical Center, 459 P.3d 835 (2020).

The positional risk doctrine is not discussed in detail in any of these cases. The Court of Appeals decision in Graber v. Dillions, 52 Kan. App. 2d 786, 377 P. 3d 1183 (2017) (review granted October 27, 2017) stated:

> "The positional risk doctrine may no longer apply in Kansas."

52 Kan. App. 2d at 796.

This may not be valid in light of the Supreme Court ruling in Graber.

In summary, the Courts do not have a consistent approach to neutral risk claims. In accidents that are a result of "acts of God" or unexplained assaults and unexplained

motor vehicle accidents, the Courts have required that the work environment either increase the risk of injury or increase the serious effects of any injury.

With unexplained fall cases, the Court of Appeals has found these cases compensable without an increased risk as compared to the risk of the general public. Instead, the claimant need only be performing his / her job duties at the time of the unexplained fall. It is unclear if the Courts are applying an actual risk standard or a positional risk standard or some type of hybrid approach.

IDIOPATHIC CAUSES

K.S.A. 44-508(f)(3)(A) also indicates that the words "arising out of and in the course of employment" shall not be construed to include an

> "… (iv) accident or injury which arose directly or indirectly from idiopathic causes."

The word "idiopathic" is not defined within the Kansas Workers Compensation Act. Board cases decided shortly after the 2011 changes in the Act defined "idiopathic" as both "of unknown origin" and "a personal health condition".

The Kansas Supreme Court in Estate of Graber v. Dillons Co., 309 Kan. 509, 439 P.3d 291 (2019) defined "idiopathic" as used in K.S.A. 44-508(f)((3)(A). Mr. Graber attended an off-site safety meeting for his employer - Jackson Dairy - a subsidiary of Dillons. The meeting was held in the conference room on the second floor of the building so Mr. Graber had to go up and down the stairs several times during the day.

At the conclusion of the meeting, Mr. Graber walked to the restroom which was located close to the stairs. He ended up face-down on a landing at about the mid-point on the stairway - shattering or breaking three (3) vertebrae in his neck.

Graber did not remember leaving the restroom and there were no witnesses. There was no evidence tending to show exactly how the fall occurred. There was no evidence of anything unusual about the stairs that might have caused Mr. Graber to trip or slip on them. There was evidence that stairs generally pose a greater risk of injury than flat surfaces.

Graber claimed workers compensation benefits which were denied by the respondent based on the idiopathic causes exception in the KWCA. Dillons argued that "idiopathic" simply means "spontaneous" or "unknown". The claimant argued that "idiopathic" referred to a personal health condition - citing Bennett v. Wichita Fence as authority.

The Supreme Court did not adopt either of these definitions. Instead, the Court found that "idiopathic" refers to:

> "The term 'idiopathic causes' in K.S.A. 2019 Supp. 44-508(f)(3)(A) (iv) means a medical condition or medical event of unknown origin that is peculiar to the injured individual."

Since no one knew why Mr. Graber fell, it is not an idiopathic cause. This is an affirmative defense and there is no evidence that any personal health condition directly or indirectly caused the fall down the stairs.

Despite the ruling of the Kansas Supreme Court in Graber, the idiopathic causes defense continues to be alleged on a regular basis. For example: in Johnson, supra at *4 - the Court of Appeals commented on the Graber decision.

> "The Kansas Supreme Court held that the plain language of K.S.A. 2018 Supp. 44-508(f)(3)(A)(iv) about the idiopathic exception renders an injury noncompensable *only upon proof* that the injury or accident arose directly or indirectly from a medical condition or medical event of unknown origin peculiar to the claimant. Graber, 309 Kan at 524, 439 P.3d 291. This

> language is clear. If a party wants to claim an exception, then there must be proof of the exception. The opinion does not require that the claimant of workers compensation benefits must prove the negative. That is, the injured worker in Graber need not prove that the injuries are not from an idiopathic cause.

See also Munoz, supra at *9 (Respondent's argument fails because it provides no evidence to show Munoz' accident arose directly or indirectly from a medical condition or event.)

At the Board level, respondents typically defend unexplained fall or unexplained accident cases by arguing that the fall was the result of either a personal risk, a neutral risk, or an idiopathic cause – i.e. - a scatter shot defense. See Jonson v. Hospital Linen Services, Inc., CS-00-0452-820 (WCAB May, 2021).

There are no Appellate cases which further define what a medical condition or medical event of unknown origin that is peculiar to the individual would encompass. This is an affirmative defense. The respondent would not only have to identify a personal medical condition but it has to be a medical condition of "unknown origin". An example would be "idiopathic epilepsy".

"Peculiar" is defined as

> "… belonging exclusively to one person or group".

Merriam Webster's Dictionary & Thesaurus (2014).

The Missouri Workers Compensation law contains a similar provision. In Taylor v. Contract Freighters, Inc., 315 S.W.3d 379 (S.D. 2010), the claimant worked as an over-the-road truck driver. On November 4, 2008, he was driving his semi. Claimant alleged that he felt a dip down as his truck veered to the right and started to veer off the road. As he attempted to correct the truck, it ran off the road. The insurance carrier denied the

claim - arguing that the accident was caused by an idiopathic condition in that - just prior to the accident - Taylor was coughing.

The Court of Appeals ruled that "coughing" was not an idiopathic condition.

> "To reach the Commission's conclusion that Claimant's idiopathic condition caused the cough on the day of the accident, there must have been some evidence that this particular cough was caused by some coughing condition *unique to the Claimant.* There is no evidence in the record to support this conclusion. The problem with the Commission's analysis is that at any time an employee coughs or sneezes, something so common that it cannot be said to be peculiar to any employee…"

315 S.W. at 382. See also Halsey & Kennedy v. Townsend Tree Service Co., No. SD 36658 (4/20/2021).

Thus, the "idiopathic causes" exclusion appears extremely narrow. It must be a medical condition or event. The origin of the medical condition must be unknown and the medical condition must be exclusive to the claimant. This is a difficult - if not impossible - burden of proof for the respondent.